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No. 730

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The respondent is dissatisfied with the portions of the Petition entitled "Opinions Below, Question Presented for Review, Constitutional and Statutory Provisions Involved" and "Statement of the Case," for the reasons hereinafter stated.

OPINIONS BELOW

The petitioners have not complied with Rule 23(i) of this Court in that they have failed to append to the Petition an opinion from the Tenth Circuit in a companion case which opinion is necessary to ascertain the grounds of the judgment below. The companion case is *Schloss v. Matteucci*, 260 F(2) 16 (10th Cir., October 9, 1958) where the identical question presented for review to this Court was decided and where petitioners' counsel appeared as amicus curiae. A printed copy of the opinion in said case is appended hereto.

QUESTION PRESENTED FOR REVIEW

The sole question presented for review, correctly stated, is this: Is the equal protection clause of the United States Constitution violated by a New Mexico statute which creates a cause of action for wrongful death against a common carrier and provides for such action to be brought against the carrier and not the operator thereof?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We take issue with the statement in the Petition that portions of the Constitution of the State of New Mexico are involved herein. If here be any conflict between the statutes and State Constitution quoted in the Petition (pp. 3, 4), a determination of that question is not necessary to the decision of this Court; therefore, such determination should not be made. *Porter v. Investors Syndicate*, 287 U.S. 346 (1932). See also *Sanford v. Poe*, 69 F. 546 (6th Cir. 1895) aff'd. in 165 U.S. 194, regarding the reluctance of Federal Courts to decide a question of constitutionality of a state statute under the state constitution and the problems involved where there is a later decision by the highest court of the state on such question.

We shall hereinafter refer to section 22-20-4 N.M.S.A. (1953) governing wrongful deaths caused by the negligence of common carriers or their agents as the "special section"; section 22-20-1, controlling deaths occasioned by the negligence of those other than common carriers, shall be denominated as the "general section."

STATEMENT OF THE CASE

The petitioners do not mention there was discussed in the briefs and argument below the fact that petitioners have also brought an action for the wrongful death of their respective decedents against the Trans World Airlines, Inc., the deceased pilot's employer. This action was filed in the United States District Court for the Southern District of New York, being cause No. 107-114 Civil on the docket of said court, and it is still pending.

ARGUMENT

At the outset it should be candidly observed that the sole objective of the petitioners in seeking to have the statutory interpretation of the courts below declared unconstitutional is to avoid the limitation on the amount of recovery for a death caused by the alleged negligence of a common carrier or its agents, as provided in the special section.

POINT I. THE HISTORY OF THE NEW MEXICO DEATH ACT, ITS ADMINISTRATION AND JUDICIAL INTERPRETATION DEMONSTRATES ITS CONSTITUTIONALITY.

The original New Mexico statutes creating a cause of action for wrongful death were enacted in 1882. Laws, N.M. 1882, C 61. Since their enactment and at all times material thereafter the statutes contained different pro-

visions for deaths caused by the negligence of common carriers and deaths occasioned by the negligence of others. These differences were: The amount which could be recovered, the party who could bring the action and the party against whom the action could be brought. The constitutionality of these statutes was never attacked from the time of their enactment until over forty years later in *De Soto Motor Corporation v. Stewart*, 62 F(2) 914 (10th Cir. 1932). In that case it was contended the New Mexico Death Act violated the same Federal and State Constitutional provisions as urged by the petitioners in this case. The precise vice claimed in the *De Soto* case was the limitation of the amount of recovery against common carriers and not against others. The Court stated at pp. 915, 916:

> "This statute has stood without challenge for more than 40 years. It was copied from a Missouri statute passed in 1855. The presumption of constitutionality that is accorded all legislative enactments is greatly strengthened by public acquiescence over a long period of time (citing cases). The case must be a clear one that would justify a court in striking down a statute which has regulated the affairs of the citizens of a state for more than 40 years. No such case is presented."

The constitutionality of the instant statutes was not again attacked until 1958, over 25 years later, in the case of *Schloss v. Matteucci, supra*, a companion case to the one at bar. Again the constitutionality was upheld. We submit that this long period of acquiescence by the public, interpretation and administration by courts and bar should be given great weight by this Court in its consideration of the Petition. Aside from the constitutional attack, other means recently have been sought to avoid the limitation of damages against carriers found in the special section. In *Tilly*

v. Flippin, 237 F(2) 364 (10th Cir. 1956) the plaintiff contended in a wrongful death action that a driver of a common carrier could be sued and a limitless recovery obtained under the general section since such driver was not specifically excluded from such section. The court stated at p. 366:

> "The argument is plausible but we think the implications of the decisions by the New Mexico courts, and by this court, lead to the conclusion that the remedy provided for in § 22-20-4 is an exception to the general death statute and is exclusive when death is caused under facts bringing the case within that section. Apparently the New Mexico bench and bar have construed the section as the trial court did. The section has been on the New Mexico statute books for approximately seventy-five years, and so far as we know, *no one* has sought to recover from a negligent employee in addition to recovery from the common carrier." (emphasis ours)

In another recent case, *In Re Reilly's Estate*, 63 N.M. 352, 319 P(2) 1069 (1958), the plaintiff (whose intestate was killed in the same T.W.A. plane crash as petitioners' decedents) attempted to escape the provisions of the special section and the resulting limitation of damages by contending a carrier by air could not be a common carrier within the meaning of such section. This contention was rejected. The contention that the estate of the deceased pilot could be sued under the general section was also rejected in this same case by the highest Court of the State of New Mexico.

POINT II THE NEW MEXICO DEATH ACT DOES NOT GRANT AN IMMUNITY.

In their attack on the constitutionality of the New Mexico Death Act, the petitioners repeatedly refer to a

"grant of civil immunity" to an operator or pilot of a common carrier. But is there such immunity granted? There is the very distinct possibility that a carrier-employer could recover indemnity from the driver-employee in the event the carrier had to satisfy a judgment obtained against it in an action for a death occasioned by the sole negligence of the employee. This was apparently the view taken by the court in *Tilly v. Flippin, supra*, when it stated that the construction of the statute as urged by petitioners herein might well "require a driver-employee to pay twice" (p. 369).

Another answer to the grant of immunity argument is this: Petitioners admit that the action for wrongful death did not exist at common law and is created by legislature enactment (Pet. p. 8). Being in derogation of the common law, the statute should be strictly construed. *Cain v. Bowlby*, 114 F(2) 519 (10th Cir. 1940) cert. den. 311 U.S. 710. It would seem to follow, therefore, that rather than a grant of immunity by the legislature there was a creation of a right which had never theretofore existed. In so doing the legislature naturally and carefully made distinctions upon and classifications of the right created.

POINT III THE CLASSIFICATION MADE IN THE NEW MEXICO DEATH ACT IS REASONABLE AND DOES NOT DENY EQUAL PROTECTION OF LAW.

The petitioners contend that the classification between a death occasioned by the negligence of a common carrier or its agents and that caused by other denies them equal protection of the laws because such classification prevents a direct action against the operator of a common carrier; as a result there is no opportunity to obtain a recovery in excess of the limitation provided by the special section. A

quick answer to this contention would be to say that petitioners are in no way denied the constitutional guaranty of equal protection since the personal representatives of all persons who meet death in a common carrier accident have the same and equal rights: They can sue the carrier under the special section. See *Barbier v. Connoly*, 113 U.S. 27. The equal protection argument would be more pertinent if the complainant were a competing airline to T.W.A. and the legislature had allowed a limitless recovery against such competitor.

Let us assume, arguendo, that petitioners are among the class who have standing to urge a violation of the constitutional guaranty. It is admitted in the Petition that the legislature had broad powers of classification but it is also contended that the classification here made and as interpreted by the courts below is unreasonable and arbitrary and hence unconstitutional (Pet. p. 13). Petitioners do *not* attack the decision of the Tenth Circuit in the case of *DeSoto Motor Corporation v. Stewart, supra*, holding that limitation of recovery against carriers and not against others was a reasonable classification and not violative of the equal protection clause. If limitation of damages were a reasonable classification in a death action against a carrier, why should a correlative limitation as to the party to be sued in such action be unreasonable? To ask the question is but to answer it. In the *DeSoto* case the court comments at page 916 on the legislative power to classify carriers in negligence actions:

> "The guaranty of the equal protection of the laws does not deny to a Legislature the right to classify along reasonable lines. From the earliest times, it has been recognized that the relations of a common carrier to the public, or to its employees, are properly the subject of

special legislation. . . . Given, then the power to put the negligence of carriers into a separate category, it is still insisted that there is neither rhyme nor reason in placing a limit on the amount of recovery against them, and no such limit where another causes the death. The power to classify carries with it the power to establish different sets of rules applicable to the different classes; and it is not fatal that the particular rules within the set may result in some inequality when applied to specific instances. In Second Employers' Liability Case, 223 U.S. 1, 53, 32 S. Ct. 169, 176, 56 L. Ed. 327, 38 L.R.A. (N.S.) 44, a statute was challenged which imposed an employer's liability upon interstate carriers by railroad, and not upon other interstate carriers. The statute was upheld, the court saying that the equal protection guaranty 'does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion, in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary'. (citing cases) There being no question as to the power of the Legislature to make the general classification, it is not necessary to seek a reason to support the particular clause of the Statute under attack. Reasons therefor; however, immediately suggest themselves."

And so in the case at bar "reasons suggest themselves" as to why the legislature did not provide for the wrongful death action to be brought against the driver-employee in addition to the carrier-employer:

1. If suit were allowed against the driver or pilot un-

der the general section and judgment obtained in excess of the $10,000 limitation provided in the special section, and such judgment were not satisfied, recovery could then be sought against the carrier for the amount of the judgment under the doctrine of respondeat superior. In that regard the New Mexico Supreme Court has squarely held that the master is liable under the general section for a death caused by the tort of the servant. *Hogsett v. Hanna*, 41 N.M. 22, 63 P(2) 540 (1936). Accordingly there could be a circumvention of the damage limitation provision of the special section. To prevent such circumvention the legislature wisely provided that the action for a carrier death should be brought solely against the carrier under such section.

2. The classification is reasonable because it prevents the carrier or its operator from having to respond twice in damages for the same death. Suppose the petitioners obtain judgment against the carrier in their New York action and are also allowed to recover from the pilot's estate in the case at bar. Upon satisfaction of the New York judgment indemnification could be sought by the carrier from the pilot's estate. The pilot's estate is thus twice vexed for the same death. Or suppose the pilot's estate fails to satisfy the judgment. Under the doctrine of respondeat superior the carrier would be vicariously liable for such judgment even though it had previously satisfied the judgment obtained against it in the New York action. These suppositious cases demonstrate the inescapable result if petitioners' position is upheld.

3. There should not be two recoveries for the same death; to prevent this the legislature classified the two types of death and provided that where a death was caused by a common carrier or its agents the action could only be brought against such carrier under the special section and

not also against the operator-employee under the general section, as urged by petitioners. That there should be only one action for one death under the instant statutes was the view of the New Mexico Supreme Court in *Romero v. Atchison Topeka & S. F. Ry. Co.*, 11 N.M. 679, 689; 72 P 37 (1903) which was the first time said statutes were construed. It was there contended in a carrier death that the action could be brought under both sections at the same time. The court remarked:

> ". . . the contention is repugnant to what we conceive to be the plain meaning of the statute, as it is incomprehensible that the Legislature should intend to provide a double remedy in damages for one and the same injury, and between practically the same parties."

And again the Tenth Circuit in *Mallory v. Pioneer Southwestern Stages*, 54 F(2) 559, 561 (10th Cir. 1931) it was said:

> "It is clear that the legislature did not intend to create two rights and provide two remedies for the same wrongful death."

Finally, in *Tilly v. Flippin, supra*, the court flatly states that to construe the statute so as to allow an action under the general section against the operator-employee "would permit a double recovery for the same death." Petitioners, having instituted a separate action in New York against the carrier-employer for the same deaths, have graphically demonstrated one of the reasons for and wisdom of the classification which they here urge as unreasonable and as a denial of equal protection. They face up to their dilemma by describing the $10,000 amount provided under the special section as an "added benefit" by way of "punitive damage" rather than a double recovery; they state a "careful reading" of the two sections shows this was the legislative intent

(Pet. pp. 11, 12). The force of this argument is completely sapped by a decision of this Court wherein it was held that the damages provided for in the special section were compensatory rather than punitive. In *Nichols v. Atchison T. & S. F. Ry.*, 364 U.S. 348, 351, it was contended that the New Mexico special section could not be enforced or administered in the California Courts because it was a penal statute and theerfore in conflict with the policy and laws of the State of California. This contention was rejected and this Court said:

> "The law of New Mexico is within the principle and description of those rulings, and of Huntington v. Attrill. It is in reparation of a private injury, not in punishment of 'an offense against the public justice of the state.' Its reparation is in a fixed amount, it is true; but it is an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the state would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because so defined."

4. Another reason for the classification allowing suits against the carrier alone lies in the possible legislative intent that otherwise it would be difficult to obtain competent and responsible operators for the vehicles in which the public was transported. A competent railroad engineer, faced with the possible tremendous loss to him or his estate because of personal liability for a wreck in which there were many deaths, might decline employment. Admittedly, this reason is not as forceful as those given above; however, it it far more plausible than petitioners' ridiculous assertion that

the classification is unreasonable because it would cause the same engineer to withhold first aid from those critically injured and give it to others! (Pet. p. 19)

Our research has disclosed that the Supreme Court of the State of Florida has also passed upon the question presented for review to this Court. In *Davis v. Florida Power Co.*, 66 Fla. 589, 60 So. 759 (1913) the court upheld the constitutionality of a statute which created a cause of action in the parents for the wrongful death of their minor child; the statute provided that where the death was occasioned by the neglect of any private association of persons, corporations or its agents, the action could be maintained against such "private association of persons or corporation." It was contended, as do petitioners herein, that the statute was unconstitutional as violative of the equal protection clause of the Federal and State Constitution because it did *not* provide that the action could also be brought against the individual whose neglect had caused the death. This contention was denied by the Florida court in a well reasoned opinion. And as stated by this Court in *Hammond Packing Company v. State of Arkansas*, 212 U.S. 322, 349:

> "Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock companies, *and does not extend to individuals*, that fact furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted." (emphasis ours)

CONCLUSION

For the reasons stated above the Petition for Certiorari should be denied.

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APPENDIX A

SEPTEMBER TERM - 1958

MILTON J. SCHLOSS, Executor of the Estate of DAN A. COLLIER, deceased,

Appellant, *Number* 5921

vs.

ROLAND J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Robert Nordhaus for Appellant.
Milton S. Seligman, Amicus Curiae.
James C. Ritchie and Jackson G. Akin for Appellee.
Before MURRAH, PICKETT and BREITENSTEIN, Circuit Judges.

MURRAH, Circuit Judge.

The estate of one of the passengers on a Transworld Airlines regularly scheduled flight sued the Company and its pilot's estate, alleging that the pilot's negligence caused a crash of the airplane in New Mexico in which all passen-

gers and crew perished. At the time of the disaster, a New Mexico statute provided that whenever a person shall die from the negligence of an employee while driving a public conveyance, the owner of such public conveyance shall forfeit and pay for every person so dying the sum of $10,000.00. § 22-20-4, N.M.S.A. 1953.[1]

This court and the New Mexico Supreme Court have construed this statute to exclude any liability of the negligent employee for the wrongful death. *Tully v. Flippin*, 237 F.2d 364, and In *re Reilly's Estate*, 319 P.2d 1069. Following this construction, the trial court awarded the statutory amount against the Airline and dismissed the action against the pilot's estate.

On this appeal from the judgment of dismissal, the appellant accepts the construction placed upon the statute by the court, but earnestly contends that so construed, it is repugnant to the equal protection clauses of the federal and state constitutions.

One argument is that it is unconstitutionally discriminatory to deny a right of action for wrongful death against a negligent employee of a public conveyance, while granting the right against other negligent employees, under New Mexico's conventional wrongful death statute. § 22-20-1, N.M.S.A. 1953. Another equal protection objection to the statute (presented amicus curiae) is that conceding the constitutional power of the legislature to distinguish between liability of employees of public conveyances and others for wrongful death, the classification here must nevertheless fail because the Act unconstitutionally relieves a negligent operator of a public conveyance of all liability

[1]Since this accident, New Mexico has removed the fixed sum penalty, and provided for conventional compensatory and exemplary damages in "such sum as a jury may deem fair and just * * * ."

for wrongful death, while leaving him liable for personal injuries not resulting in death. This classification is said to serve no legitimate legislative purpose and is therefore without constitutional basis or justification.

Historically, and especially in later times, the federal courts have been extremely reluctant to strike down state legislation as a denial of the equal protection of the laws, except in cases involving civil rights. In cases like ours, the federal courts interfere with state legislative proecsses only when there is no ascertainable basis for rational classification or discrimination. *Morey v. Dowd*, 354 U.S. 457, Classifications have been made to rest upon an almost infinite variety of facts and circumstances. See *Willoughby on the Constitution of the United States*, 2d Ed., § 1273; 12 Am. Jur. Constitutional Law, § 476 et seq. "The prohibition of the equal protection clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483. Protection against unwise and improvident legislation lies in the exercise of the suffrage right, not in the courts. "We do not 'sit as a super legislature.' " Dissenting opinion, *Colgate v. Harvey*, 296 U. S. 404, 441, quoted by Mr. Justice Frankfurter, dissenting in *Morey v. Doud, supra.*

We need not go far in our search for a rational basis for this legislative classification. Looking first to the legislative scheme and design, it is readily apparent that the legislature intended to provide a fixed sum recovery for wrongful death caused by the negligence of a common carrier's employee, and this without regard to compensatory or pecuniary loss. Indeed, the appellant does not now challenge the constitutionality of the act insofar as it provides a fixed sum recovery for the liability of the owner of a public conveyance. And see *De Soto Motor Corp. v. Stewart*, 62 F.2d 914.

Having thus afforded a fixed penalty against the carrier for wrongful death, it is not a denial of the equal protection of the law for the legislature to provide that such sum should be exclusive of all other liability for wrongful death, thereby precluding recovery against the negligent employee. It is not constitutionally unlike the Workmen's Compensation and Harbor acts which provide fixed sums for employers' liability to employees and make that recovery exclusive of all other liability to whomsoever. *Crowell v. Benson*, 285 U.S. 22; *New York Central Railroad Co. v. White*, 243 U.S. 188; *Hill Lines, Inc. v. Pittsburgh Plate Glass Co.*, 222 F.2d 854; *Underwood v. United States*, 207 F.2d 862. Both are intended to effect a definitely ascertainable legislative design.

Since the relief of public conveyance employees from liability for wrongful death was a part of the legitimate legislative scheme, it is not constitutionally objectionable for the legislature to leave them liable for negligent acts causing nonfatal injuries. This challenged result is entirely consistent with the unlimited liability of the employer for the same nonfatal negligent acts. Considered together, each facet of liability fits permissively into the symmetry of the legislative scheme and is not constitutionally infirm.

The judgment is affirmed.